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**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

UNITED FARM WORKERS, et al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL
 PROTECTION AGENCY,

Defendant.

Case No. C 08-03595 SBA

**NOTICE OF MOTION, MOTION TO
 INTERVENE, AND MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION**

Date: Tuesday, October 7, 2008

Time: 1:00 PM

Courtroom 3, 3rd Floor

The Honorable Sandra Brown Armstrong

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NOTICE TO PLAINTIFFS, DEFENDANT, AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on Tuesday, October 7, 2008, at 1:00 PM, or as soon thereafter as the matter may be heard, in Courtroom 3 of the United States Courthouse located at 1301 Clay Street, Third Floor, Oakland, California, Applicant Makhteshim Agan of North America, Inc. ("MANA") will and does hereby move the Court to grant it intervention under Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure.

By this motion, MANA seeks an Order from this Court granting it intervention as a defendant in this case. MANA has an absolute right to intervene as a defendant because it has substantial interests in diazinon, the pesticide that is the subject of this case, and those interests are not adequately represented by the existing parties. MANA holds EPA registrations pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA") for several agricultural products that are formulated with diazinon and is the authorized agent under FIFRA for Makhteshim Chemical Works, Ltd., the primary manufacturer of technical-grade diazinon in the United States. *See* 40 C.F.R. § 152.50(b)(3). Thus, MANA would be directly and adversely affected by a ruling in the Plaintiffs' favor that the Defendant, the United States Environmental Protection Agency, violated FIFRA and the Endangered Species Act in determining that diazinon was eligible for reregistration. For these same reasons, MANA also has a permissive right to intervene in this case.

On August 19, 2008, Counsel for MANA met and conferred with Counsel for Plaintiffs regarding the filing of this motion, and on August 19, 2008, Counsel for MANA met and conferred with Counsel for Defendant EPA regarding the filing of this motion. Counsel for Plaintiffs informed MANA that Plaintiffs do not oppose this motion, but declined MANA's request to stipulate to the motion being granted. Counsel for Defendant informed MANA that EPA does not oppose this motion, but declined MANA's request to stipulate to the motion being granted.

1 DATED: August 20, 2008

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1 **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE**

2

3 **I. STATEMENT OF THE ISSUES**

4 The present action arises from the United States Environmental Protection Agency's
5 ("EPA" or "the Agency") decision to continue to allow the reregistration of certain uses of the
6 pesticide diazinon. EPA's decision initially was made as part of an Interim Reregistration
7 Eligibility Decision ("IRED") for diazinon that was issued on July 31, 2002 and subsequently
8 revised on May 13, 2004. The IRED was later converted to a final Reregistration Eligibility
9 Decision ("RED") for diazinon that EPA issued on July 31, 2006.¹ IREDs and REDs are the end
10 result of a lengthy reregistration process that EPA is required to undertake for all pesticides first
11 registered before November 1, 1984. *See* Federal Insecticide, Fungicide and Rodenticide Act
12 ("FIFRA") § 4, 7 U.S.C. § 136a-1.

13 EPA concluded in the RED for diazinon that there was sufficient information on the
14 human health and ecological effects of the pesticide to support the continued use in agricultural
15 settings of diazinon-containing products. Although the Agency identified some occupational and
16 ecological risks from the agricultural use of diazinon, it found that these risks could be controlled
17 through the implementation of mitigation measures and labeling changes. Also, EPA identified in
18 the RED additional studies of diazinon's risks to human health and the environment that it
19 required be conducted by the pesticide's registered manufacturers.

20 Plaintiffs here ask the Court to declare that EPA acted arbitrarily, capriciously, and in
21 violation of FIFRA when it approved reregistration of diazinon for continued use in agricultural
22 applications. Plaintiffs also ask the Court to issue an injunction that orders EPA to make a new
23 reregistration eligibility decision for diazinon and to impose protective measures until a new
24 reregistration eligibility decision is issued. Plaintiffs also ask the Court to declare that the
25 Agency violated Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2),
26 by reregistering diazinon without first consulting the United States Fish and Wildlife Service

27

28 ¹ The diazinon IRED and RED are available on EPA's website. *See* EPA, Pesticide Reregistration Status,
http://www.epa.gov/pesticides/reregistration/status_page_d.htm (last visited Aug. 7, 2008).

1 (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively “the Services”).
2 Plaintiffs thus seek an order that compels EPA to consult with the Services on the effects of
3 diazinon and imposes interim protective measures until such consultations are complete.

4 Resolution of the Plaintiffs’ claims will have a direct, immediate, and substantial impact
5 on the ability of Makhteshim Agan of North America, Inc. (“MANA”) to market and sell its
6 diazinon products and on its investment in studies currently being performed for purposes of
7 complying with the diazinon RED. Furthermore, if this Court were to require EPA to make a new
8 reregistration eligibility decision for diazinon, MANA would be obliged to participate in that
9 proceeding, and the end result could be either more burdensome restrictions on the uses of the
10 MANA’s diazinon-containing products or the initiation of proceedings to suspend or cancel those
11 uses. *See* FIFRA § 6, 7 U.S.C. § 136d. Either of these outcomes would have a significant and
12 adverse impact on the future sales of MANA’s diazinon-containing products.

13 Thus, MANA requests that the Court determine that it may intervene in this action, either
14 as of right or permissively, so that MANA may defend its diazinon registrations.

15 **II. RELEVANT FACTS**

16 **A. Diazinon**

17 Diazinon is an insecticide, acaricide, and nematicide that was discovered in 1952 and first
18 registered for use in the United States in 1956. Until relatively recently, diazinon was one of the
19 most widely used pesticides in the United States. However, during the reregistration process the
20 diazinon registrants agreed to voluntarily cancel their registrations for residential uses of
21 diazinon-containing products, which constituted the vast majority of all registered uses. Now,
22 diazinon is registered for use only in agricultural settings. Consequently, the amount of diazinon
23 used in the past few years has dropped precipitously.

24 Due to the historic widespread use of diazinon, its health and safety risks have been
25 extensively examined and re-examined by numerous governmental regulatory bodies, including
26 EPA. Millions of dollars have been spent in the past five decades on studies of the potential
27 impact of diazinon-containing products on human health and the environment. These studies
28 have repeatedly shown that diazinon is an extremely effective pesticide, the continued use of

1 which presents readily manageable risks.

2 **B. Statutory Background And Regulatory Scheme**

3 **1. FIFRA**

4 EPA regulates the distribution and sale of pesticide products pursuant to the authorities set
5 forth in FIFRA. Under FIFRA, a company may lawfully distribute or sell only those pesticide
6 products that have been “registered” for specific uses by EPA. 7 U.S.C. § 136a(a). For a
7 pesticide to be registered, the EPA Administrator must determine, among other things, that it
8 “will perform its intended function without unreasonable adverse effects on the environment.” *Id.*
9 § 136a(c)(5)(C).

10 In 1988, Congress amended FIFRA to require the reregistration by EPA of all products
11 containing active ingredients that had been registered prior to November 1, 1984. *Id.* § 136a-1(a).
12 Those amendments established a five-phase process. *Id.* § 136a-1(b). In Phase One, the Agency
13 was to determine and list which pesticides are to be reregistered. Phase Two required EPA to
14 identify the missing or inadequate data supporting those registrations. During Phase Three, the
15 registrants of the listed pesticides were required to submit summaries of existing studies, flag
16 studies indicating adverse effects, and commit to submit additional data as needed. EPA
17 reviewed these submissions in Phase Four and required registrants to meet any unfulfilled data
18 requirements. Last, in Phase Five, EPA performed a detailed review of all data submitted for
19 each pesticide and determined whether that pesticide could be used without unreasonable adverse
20 effects on people or the environment, taking into account the costs and benefits of the pesticide’s
21 uses. *See id.* §§ 136(bb), 136a(c)(5)(C), 136a-1(g)(2)(C).

22 The reregistration process provides extensive opportunities for public participation. EPA
23 procedures are designed to promote robust public involvement while making timely pesticide
24 regulatory decisions. *See* 69 Fed. Reg. 26819 (May 14, 2004). As it has implemented this
25 reregistration program, EPA has documented its evaluations in IREDs or REDs. In either case,
26 when the Agency releases a reregistration decision it typically accepts public comment on that
27 document. Pesticides that are determined by EPA to meet current scientific and regulatory
28 standards as a result of its review of old data and newly submitted data may be declared “eligible”

1 for reregistration. Many, if not most, reregistration eligibility decisions are conditioned on the
 2 implementation of risk reduction requirements such as application restrictions or use of additional
 3 personal protective equipment.

4 As noted above, the IRED for diazinon was issued in 2002 and revised in 2004. In the
 5 IRED, EPA determined that diazinon was eligible for reregistration for agricultural uses provided
 6 mitigation measures and labeling changes were implemented.² EPA also made its reregistration
 7 determination contingent upon an assessment of the cumulative risk posed by all
 8 organophosphate pesticides (of which diazinon is an example). EPA completed that assessment
 9 in July 2006. Shortly thereafter, the Agency converted the IRED, as revised, into the final RED
 10 for diazinon, concluding that the cumulative risks did not require reconsideration of its prior
 11 reregistration decision.

12 2. The ESA

13 The ESA, 16 U.S.C. §§ 1531-44, was enacted in 1973 and has been amended on several
 14 occasions. Its goal is to protect and conserve endangered and threatened species. *Nat'l Ass'n of*
 15 *Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2528 (2007). The Act protects
 16 endangered and threatened species that have been listed ("listed species") pursuant to the
 17 rulemaking process described in Section 4 of the ESA. 16 U.S.C. § 1533. As relevant here, the
 18 ESA requires federal agencies to consult with the Services to ensure that a proposed action will
 19 not jeopardize the continued existence of a listed species. Specifically, Section 7(a)(2) of the
 20 ESA provides:

21 Each Federal agency shall, in consultation with and with the assistance of the
 22 Secretary, insure that any action authorized, funded, or carried out by such agency
 23 . . . is not likely to jeopardize the continued existence of any . . . [listed] species or
 result in the destruction or adverse modification of [designated critical] habitat of
 such species.

24 16 U.S.C. § 1536(a)(2).

25 EPA consulted with the Services in 1989 on the potential effects on listed species of the
 26 continued use of diazinon. IRED at 31. The Agency also is presently engaged in a Proactive

27 ² Prior to the issuance of the diazinon IRED, the technical registrants entered into an agreement with EPA to
 28 voluntarily phase out and cancel all indoor and outdoor residential uses of diazinon. The IRED for diazinon,
 therefore, does not analyze the risks for those uses that were phased out and/or canceled.

1 Conservation Review with the Services under Section 7(a)(1) of the ESA, 16 U.S.C. § 1536(a)(1),
2 and has stated that it would “reassess the potential effects of diazinon use to [listed species] . . .
3 [and would re]consider any regulatory changes recommended in the IRED” upon completion of
4 that review. IRED at 32. Until then, it is EPA’s intent that the risk mitigation measures specified
5 in the IRED serve as “interim protection measures.” *Id.*

6 Pursuant to Section 7 of the ESA, EPA also has recently consulted with the Services on
7 the potential impacts of diazinon use on listed and endangered Pacific salmonoid species. The
8 results of this consultation are detailed in a draft biological opinion that was released by the
9 NMFS. *See* National Marine Fisheries Service Endangered Species Act Section 7 Consultation,
10 Draft Biological Opinion, Environmental Protection Agency Registration of Pesticides
11 Containing Chlorpyrifos, Diazinon, and Malathion (July 31, 2008).

12 C. Plaintiffs’ Action

13 Plaintiffs’ complaint, filed on July 28, 2008, and subsequently amended on August 4,
14 2008, seeks judicial review of EPA’s decision to reregister diazinon. Specifically, the Plaintiffs’
15 challenge is based on the following assertions:

16 In Count I of the complaint, the Plaintiffs allege that the decision to reregister diazinon
17 was arbitrary, capricious, and contrary to FIFRA because “EPA failed to place the burden of
18 proving registration eligibility on the pesticide registrants and failed to conduct a complete
19 assessment of the risks and benefits of diazinon uses.” Am. Compl. at ¶ 50.

20 Count II of the complaint alleges that, notwithstanding the Agency’s failure to conduct a
21 complete assessment of the risks and benefits of diazinon’s uses, the decision to reregister
22 diazinon was arbitrary, capricious, and contrary to FIFRA because EPA proffered no rationale for
23 how diazinon’s benefits outweigh its risks. Am. Compl. at ¶¶ 52-53.

24 Count III alleges that EPA violated the ESA by reregistering diazinon without completing
25 the consultations with the Services required by Section 7(a)(2) of the ESA. Am. Compl. at ¶ 56.

26 In the Prayer for Relief, the Plaintiffs seek, *inter alia*: (i) a declaratory judgment that EPA
27 violated FIFRA and the ESA in reregistering diazinon; (ii) an order requiring EPA to make a new
28 reregistration decision that is based on a determination as to whether the benefits of the remaining

1 diazinon uses outweigh the risks and also on a consultation with the Services pursuant to Section
2 7(a)(2) of the ESA; and (iii) interim protective measures.

3 **D. MANA**

4 MANA is an affiliate of Makhteshim Chemical Works, Ltd. (“MCW”), which is today the
5 world’s primary manufacturer of technical-grade diazinon for pesticide products. Declaration of
6 Mr. Ephraim Gur (“Gur Decl.”) ¶¶ 1, 4 (attached as Ex. 1). MANA acts as MCW’s agent before
7 EPA on all diazinon-related matters and also coordinates the domestic distribution and sale of
8 MCW’s technical-grade diazinon. *Id.* ¶ 1. MANA also produces and sells several end-use
9 products containing diazinon for which it holds registrations. *Id.* ¶ 5. These products are used by
10 farmers in the United States to defend against a variety of soil insects and pests of fruit,
11 vegetables, and forage and field crops. *Id.* ¶ 3.

12 MANA has been an active participant in the diazinon reregistration process. In the past
13 ten years, MANA and MCW have invested millions of dollars in research and testing to support
14 diazinon’s continued registration, and they continually update that research with data generated
15 using the newest testing technologies. *Id.* ¶ 7. MANA also operates product stewardship
16 programs that support and advise customers on application techniques that minimize risks to
17 people or the environment from organophosphate pesticides, such as diazinon. *Id.* ¶ 8.

18 MANA has strong interests in the property and transactions that are the subject of this
19 case. Those interests include MANA’s registrations for diazinon, from which it derives economic
20 benefits. Moreover, as the owner of numerous other pesticide registrations that may be affected
21 by the decision in this case, MANA also has an interest in defending the reregistration process
22 itself against the Plaintiffs’ attacks.

23 **III. ARGUMENT**

24 **A. Intervention As Of Right Should Be Granted**

25 Under Federal Rule of Civil Procedure 24(a)(2), a third party is entitled to intervene as of
26 right in a case if four conditions are met: (1) the motion for intervention is timely; (2) the third
27 party claims an identifiable, “significantly protectable interest” relating to the property or
28 transaction that is the subject of the action; (3) disposition of the action may impair or impede the

MOTION TO INTERVENE AND SUPPORTING MEMORANDUM

1 third party's ability to protect that interest; and (4) the existing parties to the action may
2 inadequately represent the third party's interest. *Sw. Ctr. for Biological Diversity v. Berg*, 268
3 F.3d 810, 817 (9th Cir. 2001). This four-part test is to be construed "liberally in favor of
4 applicants for intervention." *Cemex, Inc. v. County of Los Angeles*, 92 F. A'ppx 457, 459 (9th
5 Cir. 2004); *see also Berg*, 268 F.3d at 818. MANA readily satisfies all four conditions and
6 should be granted intervention as of right in this case.

7 **1. This Motion To Intervene Is Timely**

8 In determining whether a motion is timely, District Courts in the Ninth Circuit are to look
9 to the following three factors: "(1) the stage of the proceeding at which an applicant seeks to
10 intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay."
11 *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Of the three factors, the
12 issue of prejudice to the original parties is generally considered the most important. *See United*
13 *States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (quoting Charles Alan Wright & Arthur R.
14 Miller, FEDERAL PRACTICE AND PROCEDURE § 1916 (1972)); *see also Sierra Club v. Espy*, 18
15 F.3d 1202, 1205 (5th Cir. 1994) ("The requirement of timeliness is not a tool of retribution to
16 punish the tardy would-be intervenor, but rather a guard against prejudicing the original
17 parties.").

18 The instant case is at a very early stage of litigation. The Plaintiffs filed their initial
19 complaint on July 28, 2008, and an amended complaint on August 4, 2008. EPA has yet to file an
20 answer in response to either. In addition, the first Case Management Conference is not scheduled
21 until November 5, 2008, more than two months after the date of this motion. Thus, the
22 submission of this motion to intervene is timely.

23 Moreover, under these circumstances, neither the Plaintiffs nor EPA will be prejudiced by
24 the timing of MANA's motion to intervene. *See Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th
25 Cir. 1993) (intervention timely when motion made at outset of litigation). Thus, the first
26 condition for intervention as of right is met.

1 **2. MANA Has Significantly Protectable Interests In This Case**

2 The second condition for intervention as of right is that the proposed intervenor claim a
3 significantly protectable interest relating to the property or subject of the action. A proposed
4 intervenor claims a significantly protectable interest within the meaning of Rule 24(a)(2) if the
5 interest asserted is protected by law and related to the plaintiff's claims. *Alisal Water Corp.*, 370
6 F.3d at 919. An economic interest may support intervention as of right if it is concrete and
7 related to the underlying subject matter of the case. *See id.* at 919; *see also Forest Conservation*
8 *Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995) (the interest
9 requirement assists in "dispos[ing] of lawsuits by involving as many apparently concerned
10 persons as is compatible with efficiency and due process").

11 This condition is satisfied here. MANA holds EPA registrations that allow it to distribute
12 and sell diazinon products in the United States. Gur Decl. ¶¶ 1, 4. Under the Administrative
13 Procedure Act, MANA's registrations are considered licenses that are protected by law. 5 U.S.C.
14 § 551(8) ("license" includes "the whole or a part of an agency permit, certificate, approval,
15 registration . . . or other form of permission"). As such, MANA's registrations qualify as a
16 significantly protectable property interest for purposes of determining its right to intervene in this
17 action. *See Natural Res. Def. Council v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) ("Plaintiffs'
18 complaint challenges procedures pursuant to which EPA reached preliminary decisions that the
19 intervenors' pesticide products merited continued registration. If plaintiffs succeed in this case,
20 these regulatory decisions . . . will be set aside. Thus, the intervenors can be said to have a
21 substantial and direct interest in the subject of this litigation."); *cf. Sierra Club v. EPA*, 995 F.2d
22 1478, 1485-86 (9th Cir. 1993) (ruling that holder of discharge permits under the Clean Water Act
23 had a "protectable" interest and could intervene as of right where the litigation could result in
24 modifications to those permits); *Nader v. Ray*, 363 F. Supp. 946, 953 (D.D.C. 1973) (granting
25 intervention as of right to holders of nuclear facility operating licenses issued by the Atomic
26 Energy Commission where the licenses would have been revoked or suspended if the plaintiffs
27 prevailed).

1 MANA also has a further economic interest in this case that supports granting it
2 intervention as of right. MANA enjoys economic benefits as one of only a handful of companies
3 that hold registrations to distribute and sell end-use products containing diazinon for the
4 agricultural market. Gur Decl. ¶ 5. If the Plaintiffs prevail in this case, those economic benefits
5 could be lessened or even eliminated. Gur Decl. ¶¶ 13-14. This interest, which is directly related
6 to the subject of this action, is clearly sufficient to support intervention as of right. *See, e.g.,*
7 *People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6 (D.D.C. 1993).

8 Third, MANA participated actively in the five-phase reregistration process that
9 culminated in the diazinon RED. Gur Decl. ¶ 10. The Ninth Circuit has frequently approved
10 intervention by entities that were “directly involved in the enactment of the law or in the
11 administrative proceedings out of which the litigation arose.” *Nw. Forest Res. Council v.*
12 *Glickman*, 82 F.3d 825, 837-38 (9th Cir. 1996). The rationale for this practice is that these
13 entities acquire a significantly protectable interest through their extensive involvement in the
14 regulatory process. This rationale extends to MANA, and the second criteria for intervention as
15 of right thus is met.

16 3. Disposition Of This Case May Affect MANA’s Interests

17 It is unquestionable that disposition of this action may, as a practical matter, impair or
18 impede MANA’s ability to protect its interests in diazinon. If the Plaintiffs obtain the re-review
19 of the diazinon RED that they seek, substantial burdens would be placed on MANA. Gur Decl.
20 ¶ 13. Uncertainty about the future availability of diazinon products likely will lead potential
21 customers to switch to substitutes. *Id.* MANA also would be forced to incur additional cost to
22 defend the continued registration of diazinon. *Id.*

23 Furthermore, the end result of EPA’s re-review of the RED could be the imposition of
24 additional restrictions on the distribution or use of diazinon-containing products, or even a total
25 ban on the sale of such products. *Id.* ¶ 14. Needless to say, either result would impair the value
26 of MANA’s registrations, cause substantial sales losses, and destroy the value of much of
27 MANA’s investment in the studies that enabled it to obtain and maintain its registrations. *Id.*
28 Alternatively, EPA could reregister diazinon on the condition that MANA conduct even more

1 studies on the pesticide's safety. *Id.* Depending on the number and types of studies EPA
2 required, the cost of meeting such a condition on reregistration may be so great that MANA
3 would have no choice but to cancel or narrow its registrations. *Id.*

4 In short, the disposition of this action will "as a practical matter impair or impede"
5 MANA's ability to protect its interests in diazinon. Therefore, the third element of the Ninth
6 Circuit's four-part test for intervention as of right is satisfied.

7 **4. The Existing Parties Do Not Adequately Represent MANA's Interests**

8 The final condition for intervention as of right is that the representation of a proposed
9 intervenor's interests by the existing parties "may be" inadequate. The Supreme Court has stated
10 that the burden of making a showing of inadequacy should be treated as "minimal." *Trbovich v.*
11 *United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Sw. Ctr. for Biological*
12 *Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001).

13 The courts have recognized that governmental representation of the interests of private
14 parties is often inadequate. Governmental agencies have a broad responsibility to represent the
15 public interest, whereas private companies often have a more narrow and "parochial" financial
16 interest not shared by the public at large. *See, e.g., Forest Conservation Council v. United States*
17 *Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir. 1995); *Fund for Animals v. Norton*, 322 F.3d 728,
18 736 (D.C. Cir. 2003).

19 Moreover, MANA routinely conducts research on the pesticides it registers and
20 manufactures and thus has special expertise that makes it uniquely able to both defend diazinon's
21 safety and accurately delineate the pesticide's likely effects on human health and the
22 environment. Gur Decl. ¶ 11. Furthermore, MANA has experience and knowledge in the
23 complex business of supplying diazinon products that EPA does not have. *Id.* ¶ 1; *see Natural*
24 *Res. Def. Council v. Costle*, 561 F.2d 904, 912-13 (D.C. Cir. 1977). MANA thus "can reasonably
25 be expected to contribute to the informed resolutions of these [technical and complex] questions
26 when, and if, they arise before the District Court," and its participation in defense of the diazinon
27 RED will "serve as a vigorous and helpful supplement to EPA's defense." *Costle*, 561 F.2d at
28 912-13.

1 In addition, while MANA supports the diazinon RED, its interest in diazinon is different
2 from that of EPA, and thus could lead MANA to take different positions from the Agency in
3 litigation. MANA has focused financial interests in defending the diazinon RED. In contrast,
4 EPA would face a potential conflict of interest were it to represent both the general interests of
5 U.S. citizens and the financial interests of MANA. The courts have found this potential for
6 conflict sufficient to meet the “minimal” burden of demonstrating inadequacy of representation.
7 *See, e.g., Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir.
8 1995) (finding proposed intervenors satisfied the minimal showing required for inadequacy of
9 representation because, in part, “the government must present the broad public interest, not just
10 the economic concerns of the [proposed intervenors]”); *Dimond v. District of Columbia*, 792 F.2d
11 179, 192-93 (D.C. Cir. 1986).

12 Indeed, in the particular context of pesticides regulation, the inadequacy standard is met
13 even in cases where EPA and pesticide manufacturers appear to have interests that are directly
14 aligned. *See Natural Res. Def. Council v. EPA*, 99 F.R.D. 607, 610 (D.D.C. 1983) (concerning
15 regulatory reform measures for pesticides). This is because EPA’s broader goal in challenges to
16 its pesticides regulations is “defending [the] policies and procedures that it utilizes in regulating
17 many potential harmful substances . . . ,” while the manufacturer would have “interests [that] are
18 more narrowly focused on proceedings relating to the particular pesticide [it] manufacture[s]” and
19 thus will wish to maximize its opportunities to prove that its products are safe. *Id.* Furthermore,
20 a time may come in this action when the interests of EPA and MANA diverge, and any purported
21 EPA representation of MANA’s interests would become inadequate. *See id.* For example, EPA
22 may desire to reach a settlement with the Plaintiffs that would severely restrict diazinon’s uses or
23 even phase the pesticide out. MANA may not share the same goals.

24 For the foregoing reasons, MANA cannot rely on EPA to adequately protect its interests.
25 Therefore, the fourth criterion for intervention as of right is met, and this Court should grant
26 MANA’s motion.

1 **B. Permissive Intervention Should Be Granted**

2 Alternatively, MANA should be granted permissive intervention. Federal Rule of Civil
3 Procedure 24(b)(2) sets forth the standard that governs permissive intervention. Under Rule
4 24(b)(2), a third party seeking to intervene permissively must show: (1) that its application is
5 timely and (2) that its claim or defense and the main action have a question of law or fact in
6 common. The Rule differs from Rule 24(a)(2) in that a “significant protectable interest” is not
7 required for permissive intervention, nor is there a requirement that the proposed intervenor have
8 a “direct personal or pecuniary interest” in the case. *See Kootenai Tribe of Idaho v. Veneman*,
9 313 F.3d 1094, 1108 (9th Cir. 2002) (concerning attempt to intervene in two actions challenging
10 United States Forest Service’s roadless area conservation rule).

11 MANA’s application for intervention meets Rule 24(b)(2)’s standard. As explained
12 above, MANA’s motion to intervene is timely and will not result in any prejudice to the existing
13 parties. Moreover, MANA is obviously affected by litigation that could result in significant
14 changes to, or cancellation of, pesticide registrations that it holds. Also, as is clear from MANA’s
15 proposed answer, MANA raises many questions of law and fact in its defense that also are
16 material to the main action.

17 In *Kootenai Tribe*, the Ninth Circuit held that private environmental groups lacked the
18 significant protectable interest necessary to intervene as of right. *Id.* at 1108. However, the Court
19 affirmed the district court’s grant of permissive intervention, agreeing that “the magnitude of
20 [the] case is such that both Applicants’ intervention will contribute to the equitable resolution of
21 [the] case.” *Id.* at 1111. This case also concerns issues of large magnitude. Diazinon is a popular
22 pesticide that is used on a wide variety of agricultural crops. Am. Compl. ¶ 31. Moreover,
23 MANA generates substantial revenue from diazinon sales. Thus, the outcome of this case has
24 potentially significant ramifications for the U.S. agricultural economy and for MANA.
25 Consequently, MANA should be allowed to participate in this case.

26 **IV. CONCLUSION**

27 For the foregoing reasons, MANA respectfully requests that its Motion to Intervene be
28 granted.

1 DATED: August 20, 2008

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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 UNITED FARM WORKERS, et al.,)
5 Plaintiffs,) Case No. C 08-03595 SBA
6 v.) [PROPOSED] ORDER
7 UNITED STATES ENVIRONMENTAL)
8 PROTECTION AGENCY,)
9 Defendant.)

10 THIS MATTER having come before the Court upon the Motion of Makhteshim Agan of
11 North America, Inc. ("MANA") to Intervene as Party Defendant ("Motion"), the Court having
12 considered the parties' submissions related thereto, and it appearing that good cause exists for this
13 order, and it also appearing that the standard for intervention as of right, Federal Rule of Civil
14 Procedure 24(a)(2), is met in that (1) MANA's motion is timely, (2) MANA claims an
15 identifiable, significantly protectable interest in diazinon – the pesticide that is the subject of this
16 action, (3) disposition of this action may impair or impede MANA's ability to protect that
17 interest, and (4) neither Plaintiffs nor Defendant adequately represent MANA's interest in
18 diazinon, now, therefore

19 IT IS HEREBY ORDERED that the Motion is GRANTED and the clerk is directed to file
20 the proposed Answer.

21 DATED this ____ day of ____, 2008.

22
23
24 SAUNDRA BROWN ARMSTRONG
United States District Judge